

1 undue embarrassment.

2 Plaintiff may attempt to introduce evidence at trial that is unfounded, inflammatory, and
3 speculative- introduced solely for the purpose of embarrassing PSS witnesses and Defendant.
4 PSS believes at trial plaintiff will try to introduce unflattering personal information about Brewer
5 and another Hopwood administrator that is unrelated to work performance and this case.
6 Plaintiff may go so far as to suggest that there was an affair between Defendant Brewer and
7 another administrator at Hopwood. Plaintiff may also attempt to inquire about an alleged
8 consensual relationship between Defendant Brewer and a co-worker at a former place of
9 employment in the U.S. mainland.

10 This evidence should be excluded at trial on grounds of relevance, unfair prejudice,
11 confusion and a waste of the court's time. *United States v. Lopez*, 611 F.2d 44, 45 (4th Cir.
12 1979) ("Courts should have the power to protect witnesses against cross-examination that does
13 little to impair credibility but that may damage their reputation, invade their privacy and assault
14 their personality"). Rule 403, Federal Rules of Evidence¹ provides the courts with the power to
15 do just this.

16 In addition, Federal rules of Evidence 611 (a) provides courts with discretion to protect
17 witnesses from questioning that causes "harassment or undue embarrassment." "Harassment" is
18 intended to refer to a "manner of examination that is offensive." Charles Alan Wright and Victor
19 James Gold, 28 Federal Practice and Procedure, Evidence § 6164. "Undue embarrassment"
20 refers to "the offense that is caused by the subject matter of questioning." *Id.* Rule 611(a)
21 contemplates that courts will intervene to prevent only "undue" embarrassment. The courts task
22 under Rule 611 is essentially "to balance the extent to which the subject of questioning is
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25 ¹ Rule 403 should also be used provides:

26 Although relevant, evidence may be excluded if its probative value is substantially outweighed by the
27 danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay,
28 waste of time, or needless presentation of cumulative evidence.

1 offensive against the potential probative value to be derived from the examination.” *Id.*

2 “Most of the cases where courts have intervened [under rule 611] involve questioning
3 concerning the illegality or acts involving sex, drugs, religion, and other matters of a highly
4 personal nature.” Wright and Gold, § 6164. For example in *U.S. v. Scroggins*, 939 F.2d 416,
5 421 (1991), the Seventh Circuit concluded that the trial court did not abuse its discretion
6 prohibiting the defendant from impeaching a government witness with questions regarding a sex-
7 change operation: Even if we were to acknowledge that NA’ sexual identity had any potential
8 relevance to her credibility, we would not conclude that the court erred in protecting NA from
9 the much more obvious potential of such harassment and embarrassment. Furthermore, Mr.
10 Scroggins had ample opportunity to attack NA’s credibility on other, more relevant grounds. The
11 district court is authorized to “exercise reasonable control over the mode and order of
12 interrogating witnesses and presenting evidence so as to ... protect witnesses from harassment or
13 undue embarrassment.” Fed.R.Evid. 611(a).

16 In *U.S. v. Allen*, 772 F.2d 1555, 1557 (11th Cir. 1985), the Eleventh Circuit ruled that the
17 trial court acted within its authority under Rule 611(a) to protect witnesses from harassment or
18 undue embarrassment by prohibiting cross-examination regarding the witness’s intimate
19 relationship with a woman who had been placed in his custody as a ward, where defendant failed
20 to develop some link between credibility of witness and the relationship. The extent of cross-
21 examination with respect to an appropriate subject of inquiry is within the trial court’s discretion.
22 *US v. Allen* at 1557. Fed R. Evid. 611 (a)(3) allows the court the exercise reasonable control
23 over the examination of a witness to protect them from harassment or undue embarrassment.

25 Any attempt at introduction of such ludicrous allegations has no place in this trial. Even
26 in a sexual harassment case, evidence of consensual relationships between the plaintiff’s
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coworkers and a supervisor is not relevant, as it does not amount to discrimination under Title VII. See EEOC “Policy Guidance of Employer Liability Under Title VII for Sexual Favoritism, N 915-048, January 1990 (“Title VII does not prohibit isolated instances or preferential treatment based on consensual romantic relationships”; *Burgess v. Gateway Communications, Inc.*, 26 F. Supp. 2d 888, 893 (S.D.W. Va. 1998) (Dismissing hostile environment claim based on alleging favoritism toward paramours). According to the court in *Candelore v. Clark County Sanitation Dist.*, 975 F.2d 588, 590 (9th Cir. 1992) isolated instances of consensual relationships have no relevance to a plaintiff’s sexual harassment claim because “[a] co-worker’s romantic involvement with a supervisor does not by itself create a hostile work environment.” Courts have also acknowledged the potential prejudice of such a revelation. *Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533, 539 (9th Cir. 1994) (as to evidence of a manager’s sexual relationship with his administrative assistant, “the potential for unfair prejudice is obvious.”) The only reason for plaintiff’s counsel to dig around for this information is to harass and embarrass defendants, such information and allegations offers no probative value to this case whatsoever.

Defendant PSS requests that the court exclude all such evidence and testimony pursuant to Fed. R. Evid. 402, 403, and 611. The information is irrelevant and if considered marginally relevant, it is prejudicial and misleading as stated in this memorandum.

Respectfully submitted this 16th day of February, 2007.

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